

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

STACEY LEA SIMS, individually and
on behalf of others similarly situated
Plaintiff

V.

NO. 3:96CV206-B-A

UNION PLANTERS BANK OF
NORTHEAST MISSISSIPPI, N.A.
Defendant

MEMORANDUM OPINION

This cause comes before the court upon the defendant's motion to dismiss. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

When considering a motion to dismiss, the court is to accept the plaintiff's factual allegations as true, and determine if it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. Blackburn v. City of Marshall, 42 F.3d 925, 931 (5th Cir. 1995). The factual allegations as alleged by the plaintiff are as follows. The plaintiff had a balance of \$8.32 when she went to the defendant bank to close her checking account. Although the plaintiff had no outstanding checks, a representative of the defendant suggested that she leave the \$8.32 in the account to cover any service charges that the plaintiff had incurred. The plaintiff agreed to

do so. At the end of the month, a service charge of \$10.50 was assessed to the plaintiff's account because the account balance had

fallen below the account minimum during the month. That left the plaintiff's account overdrawn by \$2.18. The bank charged the plaintiff a \$20.00 overdraft fee, as well as \$5.00 per day until the overdraft was corrected. However, the bank did not immediately notify the plaintiff of the overdraft. The plaintiff did not discover the overdraft until her monthly statement was sent to her, by which time the overdraft had grown to in excess of \$55.00.

The plaintiff has filed suit for violation of the Truth in Lending Act and Federal Reserve Board Regulation Z, as well as for breach of contract, negligence and unjust enrichment. The plaintiff is seeking to certify a class action. The defendant moves to dismiss the federal claims with prejudice, and further moves the court to dismiss the remaining state law claims without prejudice. The plaintiff asks that if the court find that the motion to dismiss should be granted, that she be given leave to amend her complaint to allege other federal causes of action.

LAW

The Truth in Lending Act (hereinafter "TILA" or "the Act") is intended to promote the informed use of credit by requiring certain disclosures to consumers regarding the terms and cost of credit. 15 U.S.C. § 1601(a); 12 C.F.R. § 226.1(b). TILA provides that the Board of Governors of the Federal Reserve System shall promulgate appropriate regulations to carry out its purposes. 15 U.S.C. § 1604. Those regulations, commonly referred to as Regulation Z,

are codified at 12 C.F.R. part 226. Among other things, TILA and Regulation Z require certain disclosures to be made regarding finance charges.

The plaintiff concedes that the \$20.00 overdraft fee is not a finance charge, and therefore does not violate TILA. The plaintiff's federal claim is based upon the \$5.00 daily overdraft fee, which the plaintiff asserts was assessed in violation of the Act. In accordance with its provisions, Regulation Z applies:

to each individual or business that offers or extends credit when four conditions are met: (i) the credit is offered or extended to consumers; (ii) the offering or extension of credit is done regularly; (iii) the credit is subject to a finance charge or is payable by a written agreement in more than four installments; and (iv) the credit is primarily for personal, family, or household purposes.

12 C.F.R. § 226.1(c). That subsections i, ii, and iv apply is not contested by the defendant, whose motion is based on the assertion that the requirements of subsection iii are not met. The plaintiff does not allege that the credit "is payable by a written agreement in more than four installments." In fact, the plaintiff is adamant that there was no written agreement concerning any overdraft charges. Therefore, the plaintiff's federal claim rests upon the proposition that the \$5.00 daily overdraft fee is a finance charge, and thus subject to the requirements of TILA as set forth in Regulation Z.

Regulation Z defines "finance charge" as "the cost of consumer credit as a dollar amount. It includes any charge paid directly or

indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit." 12 C.F.R. § 226.4(a). Regulation Z further states that "charges imposed by a financial institution for paying items that overdraw an account" are not finance charges, "unless the payment of such items and the imposition of the charge were previously agreed upon in writing." 12 C.F.R. § 226.4(c)(3). The commentary to Regulation Z provides that "a charge on an overdraft balance computed by applying a rate of interest to the amount of the overdraft is not a finance charge, even though the consumer agrees to the charge in the account agreement, unless the financial institution agrees in writing that it will pay such items." 12 C.F.R. § 226, Supplement I--Official Staff Interpretations, Paragraph 4(c)(3).

The \$5.00 daily overdraft fee is assessed for every day that an account is overdrawn, and therefore, in accordance with § 226.4(c)(3), the fee is not considered a finance charge. Furthermore, the \$5.00 fee, while not computed by applying a rate of interest to the amount of the overdraft, is very similar to the example cited from the commentary, in that it is a charge on an overdraft balance. The only difference between the example cited in the commentary and the situation at hand is that the example concerns a variable charge determined by the amount of the overdraft, whereas the facts in this case concern a fixed charge

regardless of the amount of the overdraft. Both concern charges that are incurred when an account is in an overdrawn state.

The plaintiff has failed to cite to any statute, regulation or case which supports her position that the \$5.00 daily overdraft fee is a finance charge. The plaintiff quotes a definition of "finance charge" found in the Mississippi Code, but such definition, by its own terms, is only applicable to certain enumerated sections of the Code. Since the plaintiff's TILA claims do not concern those enumerated sections of the Code, the definition found in Miss. Code Ann. § 75-17-226 does not apply. The plaintiff further cites to the United States Supreme Court's decision in Smiley v. Citibank, 135 L. Ed. 2d 25 (1996), which this court likewise finds inapplicable. Smiley concerned a bank's ability to charge late payment fees to its credit card customers. In support of her position, the plaintiff points to the Supreme Court's construction of the term "interest" as used in the National Bank Act of 1864, codified at 12 U.S.C. § 85. Any reliance on Smiley is misplaced. First, the plaintiff has made no claim under the National Bank Act of 1864. Second, the issue at hand is not whether the \$5.00 daily overdraft fee is "interest" as defined in the National Bank Act, but rather whether the fee is a "finance charge" as defined under TILA.

Since the \$5.00 daily overdraft fee is not a finance charge, as defined in Regulation Z, the Regulation does not apply. The

plaintiff has failed to show that the \$5.00 fee meets the third condition for coverage listed in § 226.1(c), namely that the credit is subject to a finance charge or is payable by a written agreement in more than four installments. Therefore the imposition of the fee is not governed by the disclosure requirements of the Truth in Lending Act.

All other claims asserted by the plaintiff are brought pursuant to state law, and therefore are not properly before this court in the absence of any viable federal claim. The district court may decline to exercise supplemental jurisdiction over a claim if the district court has dismissed all claims over which it had original jurisdiction. 28 U.S.C.A. § 1367(c)(3) (West 1993). For this reason, the court finds that the remainder of the plaintiff's claims should be dismissed without prejudice.

The plaintiff has asked that should the court find that the motion to dismiss should be sustained, that she be granted leave to amend her complaint so as to allege other federal causes of action. The court finds that the plaintiff's motion to amend should be denied.

CONCLUSION

For the foregoing reasons, the court finds that the defendant's motion to dismiss should be granted, and the plaintiff's motion for leave to amend should be denied. An order will issue accordingly.

THIS, the _____ day of February, 1997.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE